

PAUL SCOTT KLEIN

IBLA 94-42

Decided December 22, 1998

Appeal from a decision by the Arizona State Office, Bureau of Land Management, denying a small miner exemption for the Van Burch Gold #1 through #10 mining claims (AMC 320865 through AMC 320874).

Affirmed.

1. Mining Claims: Plan of Operations--Mining Claims:
Rental or Claim Maintenance Fees: Small Miner Exemption

The Department of the Interior and Related Agencies Appropriations Act for Fiscal 1993 required mineral claimants to file a notice or obtain an approved plan of operations in order to obtain a small miner exemption, even when a notice or an approved plan of operations is not required before undertaking exploration, assessment work, or other activity on a mining claim.

APPEARANCE: Paul Scott Klein, Ely, Nevada, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Paul Scott Klein has appealed an October 5, 1995, decision issued by the Arizona State Office, Bureau of Land Management (BLM or Bureau), denying a small miner exemption for the 1992-93 assessment year for the Van Burch Gold #1 through #10 mining claims (AMC 320865 through AMC 320874) and denying an exemption for the 1993-94 assessment year as moot.

The Bureau denied an exemption for the 1992-93 assessment year because Klein's certificate of exemption did not identify "the Agency under which a valid notice or plan of operations was issued, the date of approval or serial number of the notice or plan of operations" as required by Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), Pub. L. No. 102-381, 106 Stat. 1374 (1992) and 43 C.F.R. §§ 3833.1-6(a)(4) and 3833.1-7(d)(1).

Klein does not challenge BLM's factual determination but raises two issues. First, he states that in a cover letter accompanying his

affidavit of assessment work, 1/ he informed BLM that the assessment work for the 1992-93 assessment year was performed prior to enactment of Pub. L. No. 102-381. Second, he contends that when he performed the work he "only used hand sampling which did not disturb any of the surface resources" and the law did not require filing a notice or plan of operations so long as heavy equipment was not used and less than 2 acres were disturbed. In effect, Klein argues that he was not required to identify a notice or an approved plan of operations because neither was required to perform his assessment work.

The Act required that:

for fiscal year 1993, for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *.

Id. at 1374. A substantially identical provision required mineral claimants to also pay by August 31, 1993, a \$100 rental fee to hold an unpatented mining claim, mill or tunnel site during the assessment year beginning September 1, 1993. Id. Congress determined that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant * * *." Id. at 1379.

The Act also provided an exemption for a mineral claimant with 10 or fewer claims who was either "producing under a valid notice or plan of operation not less than \$1,500 and not more than \$800,000 in gross revenues per year" or "performing exploration work to disclose, expose, or otherwise make known possible valuable mineralization * * * under a valid notice or plan of operation" and had fewer than 10 acres of unreclaimed surface. Id. at 1379 (emphasis supplied). A claimant who met those requirements could "elect to either pay the claim rental fee for such year or in lieu thereof do assessment work required by the Mining Law of 1872,"

1/ The letter Klein refers to is a memorandum from Klein to BLM, dated Sept. 5, 1993. This memorandum sets forth the matters he describes in his notice of appeal. The case file is incomplete, however. It does not include location notices, affidavits of assessment work, or other documents pertaining to the history of the claims.

fulfill the requirements of 43 U.S.C. § 1744(a) and (c) (1994), "and certify the performance of such assessment work to the Secretary by August 31, 1993." Id.

As promulgated in 1993, the regulations cited in BLM's decision provide that, to qualify for a small miner exemption, mining claims had to be subject to "[o]ne or more Notices or approved Plans of Operations pursuant to subparts 3802 or 3809" or an equivalent authorization by another Federal agency or state or local authority, and an applicant had to identify the serial number assigned to the notice, plan of operations, or permit. 58 Fed. Reg. 38186, 38199-200 (July 15, 1993).

[1] Klein correctly understands that he was not required to file a notice or obtain an approved plan of operations prior to performing the assessment work he describes. See 43 C.F.R. § 3802.1-2, 3809.1-2 (1993). It is also true that the Act did not require the filing of a notice or an approved plan of operations before undertaking exploration, assessment work, or other activity on his mining claims. However, the Act did require a valid notice or an approved plan of operations as a requisite for obtaining a small miner exemption. Although the assessment work had been completed, Klein could have satisfied the requirement by filing a notice identifying future activities on the claims. The Bureau correctly determined that he failed to provide the information required by 43 C.F.R. §§ 3833.1-6(a)(4) and 3833.1-7(d)(1) (1993).

Neither the regulations nor the Act require a mining claimant to file a notice prior to undertaking the activities identified in 43 C.F.R. § 3802.1-2. The Act, however, as well as the regulations implementing it, require a valid notice or an approved plan of operations in order to obtain an exemption from rental fees. See 43 C.F.R. §§ 3833.1-6(a)(4)(i); 3833.1-7(d)(1); see also 58 Fed. Reg. 38191 (July 15, 1993) ("One comment asked whether miners whose mining activity is not at the plan or notice level can be eligible for the small miner exemption. The answer is no because, as stipulated in this section [3833.1-6] and the Act, the activity must be at plan or notice level as defined by the surface managing agency.") The only way he could maintain his claims, absent a notice or an approved plan of operations, was to pay the required rental fees. BLM's decision holding the claims void for failure to pay the fees or obtain an exemption by August 31, 1993, was correct.

Notwithstanding our conclusion, there is a second reason that the claims were properly deemed to be void. The case file does not contain a certificate of exemption for the 1993-94 assessment year. This fact was noted on the face of the form filed for the 1992-93 assessment year. The Act and the regulation at 43 C.F.R. § 3833.1-7(d) (1993) required a claimant seeking a small miner exemption for 2 separate years to file a separate certificate for each of the 2 years by August 31, 1993. Daniel D. Dooley, 138 IBLA 352, 354 (1997); Jim Wright, 138 IBLA 297 (1997); Richard L. Shreves, 132 IBLA 138, 140 (1995); Edwin L. Evans, 132 IBLA 103 (1995).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of the Arizona State Office is affirmed.

R.W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge